No. [redacted] 222

Office - Supreme Court, U.S.
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JUN 25 1957
JOHN T. FEY, Clerk

[redacted] FOR [redacted] AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12, 822

THE CITIZENS BANK & TRUST COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court

For The District of Columbia

Camden R. McAtee
1021 Tower Building
Washington, D. C.
Attorney for Appellant.

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 9 1955
Joseph W. Stewart
CLERK

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APPENDIX FOR APPELLANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA
Administrator d.b.n. of the estate of Joseph Kelly Kerr, deceased,
P. O. address as above.
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 5156-54

FILED DEC. 4 - 1954

COMPLAINT FOR RECOVERY OF JUDGMENT DEBT

For complaint for recovery of a judgment debt of the United States to plaintiff, in the principal sum of $7404.75, this plaintiff, The Citizens Bank and Trust Company of Bloomington, Indiana, Administrator de bonis non of the estate of Joseph Kelly Kerr, deceased, respectfully states:

1. Plaintiff, at the times hereinafter mentioned, is a foreign administrator, appointed and qualified, pursuant to orders duly entered by and in the Circuit Court of Monroe County, State of Indiana, then and now having jurisdiction of the estate of said Kerr, and of this plaintiff because the residence of decedent, at the time of his death, and the principal office of plaintiff were in said county and state; by amendment of the corporate charter of plaintiff, on March 29 1945, the corporate name of plaintiff, Citizens Loan & Trust Company, under which it was originally appointed as Administrator, de bonis non, of and for said Kerr estate, was changed to its present name The Citizens Bank and Trust Company of Bloomington, Indiana.

2. The principal amount in controversy herein is in excess of Three Thousand ($3000) Dollars, jurisdiction over this action for

recovery upon a judgment debt of the United States, is conferred by 28 U.S.C., 1346, and, for its prosecution by this plaintiff as a foreign administrator, by 20 D. C. Code, 505, (1940).

3. On June 30, 1942, in this Court, in Law Action No. 70830, captioned Elizabeth Kerr, Admx. of the Estate of Joseph Kelly Kerr, deceased, et al., vs. The United States of America, to which action and its proceedings, reference is made for greater certainty, and, in which, this plaintiff under its former name was duly substituted as plaintiff, upon suggestion of the death of Elizabeth Kerr of record, during its pendency in the United States Supreme Court, the following judgment order was duly entered of record, and has been thereafter in full effect as now herein stated, viz:

> "Pursuant to the mandate of the Supreme Court of the United States duly filed herein on June 12, 1942, which recites the substitution as respondent in and before said Supreme Court of Citizens Loan & Trust Company, administrator de bonis non of the Estate of Joseph Kelly Kerr, Deceased, in the place and stead of the original plaintiff herein, Elizabeth Kerr, Administratrix of said Estate, as the result of suggestion of her interval death, and which severally orders that the case be so continued and maintained by and in the right of said substituted plaintiff, and that the judgment of the United States Court of Appeals for the District of Columbia recited in said mandate be and is reversed, and that the cause be remanded to this Court for reinstatement of its certain judgment by this Court in conformity with the opinion of the said Supreme Court, and this Court being advised, it is this 30th day of June, 1942:
>
> "ORDERED AND ADJUDGED: That the certain judgment of this Court entered on January 9, 1941, for recovery from the defendant, the United States, of $8,227.50, as of April 5, 1940, by the plaintiff, Elizabeth Kerr, Administratrix as aforesaid, be and the same is reinstated as always in full force and effect and forthwith payable, but subject to the amendment hereby ordered and made that the said recovery be and is payable to the substituted plaintiff, Citizens Loan & Trust Company, Administrator de bonis non of the estate of Joseph Kelly Kerr, deceased, subject to the payment to Camden R. McAtee, plaintiff attorney of record, of 10% thereof, for legal services herein, and in reduction of the amount payable to said substituted plaintiff.

6 4. On December 7, 1942, this Court duly entered its order in denial of motions on behalf of the United States, filed on July 3, 1942, and upon September 13, 1942, each of which was premised that this plaintiff, to be entitled to the proceeds of said judgment order by payment, must first satisfy this Court the estate of decedent Kerr would not escheat under the laws of his last place of residence, and which motions tended to alter materially the provisions of said judgment order until so denied.

5. (a) On or about March 7, 1943, plaintiff states, as upon information and belief that the Attorney General, duly certified his determination that no appeal was to be, or had been taken, upon the order of denial of December 7, 1942, also, that the said judgment order of June 30, 1942, was then deemed the final end of the litigation, and, also, that, thereupon, the Department of Justice forwarded said judgment order to the Administrator of Veterans Affairs, as being a final judgment rendered against the United States by a district Court, for payment according to its provisions, upon settlement by the General Accounting Office, in accordance with the award of said Administrator of the necessary moneys from the military and naval insurance appropriation available to the Veterans Administration for the payment of the judgment.

5. (b) Plaintiff further states that this plaintiff, in its fiduciary capacity herein disclosed, and said Kerr estate were not in any manner, indebted to the United States, at the time of entry of said judgment order on June 30, 1942, or at any time thereafter, and are not now indebted, in any manner, to the United States.

6. Plaintiff states the proceedings in said Law Action No. 70830, evidence the payment of $822.75, for account of said judgment recovery,
7 to the attorney of record for plaintiff for his legal services in said action, and do not evidence any payment or other disposal of the balance of said judgment recovery in the remaining principal amount of $7404.75; that plaintiff has demanded payment of said balance and its payment has always been refused; that said refusal is collateral attack upon said judgment order by impugnment of its judicial finality by summary administrative or executive refusal to give effect to its provisions; for

its forthwith payment and said refusals of payment have effected, and continue to effect summary withholding, taking keeping and conversion of property of plaintiff and said estate without right or due process by law, and with consequent continuing damage to plaintiff and to said estate.

Wherefore, plaintiff, The Citizens Bank and Trust Company of Bloomington, Indiana, Administrator de bonis non of the Estate of Joseph Kelly Kerr, deceased, prays:

The entry of orders granting judgment in recovery to plaintiff against the United States in the principal sum of $7404.75, due and unpaid as of, and since April 5, 1940, also in recovery of such additional sums as the circumstance of the case appear to entitle plaintiff, also granting and providing the necessary administrative proceedings for the payment of the recoveries so ordered, for costs and for all other proper relief.

* * * * * *

8 [FILED FEBRUARY 7, 1955]

MOTION TO DISMISS

Comes now the United States of America by its attorney, the United States Attorney, and moves this Honorable Court to dismiss the complaint herein for failure to state a claim upon which relief may be granted.

* * * * * *

9 [FILED FEBRUARY 7, 1955]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

This action was filed on December 6, 1954. It appears from the face of the complaint herein that the judgment upon which the suit is brought was entered by this Court on June 30, 1942, over twelve years and five months prior to the filing of the complaint. Section 15-102 of the District of Columbia Code provides that the life of a judgment shall

be brought thereon after the running of such period. It failing to appear that action has been taken to extend the judgment under the provision of Title 15, District of Columbia Code (1951) and in accord with the Rules of this Court, it is submitted that the complaint herein should be dismissed for failure to state a claim upon which relief may be granted. Dutton v. Parish, 34 App. D. C. 393 (1910).

* * * * * *

[FILED FEB. 10, 1955]

Plaintiff Response to Defendant Motion to Dismiss the Complaint.

For response to same, plaintiff, Citizens Bank and Trust Company, etc., Administrator, etc., by its attorney, states the Motion of defendant to dismiss the Complaintis without sufficient basis, and should be denied, for cause shown in annexed Points and Authorities.

* * * * * *

[FILED MAY 13, 1955]

PROCEEDINGS

THE CLERK: No. 6, The Citizens Bank & Trust Company of Bloomington, Indiana, v. The United States.

(Discussion off the record.) (Hearing, Mar 2, 1955.)

THE COURT: It is agreed between counsel for the plaintiff and counsel for the defendant that the complaint herein be amended so as to allege that judgment was originally entered in this case on June 30, 1942, that on July 3, 1942, a motion to vacate was filed, and on September 13, 1942 a motion to stay was likewise filed, and that these two motions, namely, the motion to vacate and the motion to stay, were denied by the court on December 7, 1942.

Is that accurate?

MR. HAMILTON: It is perfectly accurate from our standpoint.

(Discussion off the record.)

(Thereupon, at 11:30 a. m., the hearing in the above-entitled cause was adjourned.)

* * * * * *

[FILED MAR 8 - 1955]

ORDER

This cause having come on for hearing on defendant's motion to dismiss and plaintiff's opposition thereto and the Court having heard oral argument and having been fully advised in the premises, it is this 8th day of March 1955,

ORDERED, That the complaint be and it is hereby dismissed.

* * * * * *

[FILED MAR 12, 1955]

MOTION BY PLAINTIFF FOR REHEARING, ETC.

Plaintiff, Citizens Bank and Trust Company, Administrator d.b.n. of Estate of Joseph Kelly Kerr, deceased, by its attorney, moves the Court for entry of its orders:

In grant to plaintiff of rehearing upon the defendant Motion to Dismiss plaintiff Complaint for failure to state a sufficient cause of action, and

In relief to plaintiff from the Order of Dismissal of plaintiff Complaint entered herein on March 8, 1955, and

Files Points and Authorities as cause herefor.

* * * * * *

[FILED MAR 30 - 1955]

ORDER

Upon consideration of plaintiff's motion for rehearing and defendant's opposition thereto, and it appearing to the Court that good cause has not been shown therefor, it is this 30th day of March, 1955,

ORDERED that the motion be and it is hereby denied.

Here are omitted: - because same appear in the Petition for grant of Writ of Caertiorari,

R.7-11- The per Curiam and Concurring opinions of the Court of Appeals, decided December 20, 1956;

Also

R. 12 The Judgment of the Court of Appeals, dated December 20,

PETITION OF APPELLANT FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,822

CITIZENS BANK & TRUST COMPANY
of Bloomington, Indiana, Administrator
d. b. n. of the Estate of Joseph Kelly Kerr,
Deceased,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

CAMDEN R. McATEE
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Washington, D. C.
Attorney for Appellant.

Filed February 11, 1957

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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Parenthetically: Because per curiam excludes limitations from consideration, said limitations are plainly not applicable, nevertheless, to the instant final judgment because of its statutory situation as to payment	3
The sufficiency of appellant points justify reversal:	
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Parenthetically: (because P.C. excludes said issues by nonconsideration) (1) is plainly rejected in appellee precedents, cited on other proposition, posed but not decided by P.C. that C. of C. has jurisdiction of judgment on judgment because appropriation is made after and not before entry of original judgment; 2nd issue of six-year statute falls out as appellant proceeding is ancillary and not independent action, per FRCP 81 and Local R. 30	3
The insufficiency of appellee contentions justify reversal.	
The new ground, on which the parties were not heard, in the P.C. for dismissal of the appeal, that appellant would be no better off than before by the new judgment, is not sustained by the Hetfield decision	5
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The instant case is exactly the Benedict case, except that it is about a judgment in the same court.	4
Finding, as the P.C. does, that claimant relief would be no more than previously obtained, the C. of C. in Benedict does not relegate claimant to mandatory proceeding.	5
Instead, finding non-payment of a judgment of another federal court contrary to its provisions, the C. of C., proclaiming the finality of the judgment, extends its jurisdiction to such judgment, and gives full relief provided in the foreign judgment, although more than the C. of C. might give on the original claim.	5
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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 12, 822

CITIZENS BANK & TRUST COMPANY
of Bloomington, Indiana, Administrator
d. b. n. of the Estate of Joseph Kelly Kerr,
Deceased,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PETITION OF APPELLANT FOR REHEARING

Above appellant, by its attorney, respectfully petitions this Honorable Court for entry of its orders, in grant of rehearing herein, to be inclusive of withdrawal of the pending opinions and decision, published on December 20, 1956, of further oral argument, and of reconsideration of said appeal (preferably en banc because of the unusual case).

Sufficient relief to appellant is submitted to be judicial finding and order below, in revival from dormancy of the final judgment hereinafter identified, and that the appellant's right to dutiful administrative performance of lawful acts necessary for payment and satisfaction of said judgment was and is absolute and not subject to administrative refusal of such performance.

The appeal is unusual, of first instance, involving the fundamental citizen right to recover the proceeds of a money judgment from the

United States.

This petition would respectfully present the pending opinions and decision, that put aside the grounds relied upon by the parties, that find the appeal without substance, that order same dismissed below upon an entirely different ground; are not responsive to appellant claim presented as in the following circumstances:

On December 4, 1954, in its proceeding filed in the District Court below, appellant, alleging neither appellant nor its fiduciary estate was or is ever indebted in any manner to the United States, claimed all general relief, as well as special relief being re-entry of judgment against the United States in the principal sum of $7404.75, the unpaid balance of a prior final judgment for $8227.75 recovered against the United States by appellant in a prior action between the parties in said District Court, as duly entered below, on June 30, 1942, pursuant to and by direction of a mandate of the Supreme Court of the United States. Appellant alleged the United States had expressly consented to be sued by appellant in said prior action, and had provided for payment of any resulting final judgment administratively from an available permanent appropriation, also, that, on December 7, 1942, the District Court entered its order in denial of pending motions of the United States, ..ed on July 3, 1942, and September 13, 1942, which sought to require appellant, to be entitled to payment of said judgment, to satisfy the Court its proceeds, as estate of the insured, would not escheat under the laws of the State of residence of insured, also, that on March 7, 1943, the Attorney General certified the order of denial had not and would not be appealed, whereby the judgment was deemed statutorily final as the end of litigation, and was forwarded to the Veterans Administrator for settlement by the General Accounting Office and administrative payment from the available appropriation, also, that the record in the prior action discloses administrative payment of $822.75 as an attorney fee provided in said judgment, but does not disclose payment or disposal of the judgment balance of $7404.75, also that demand by appellant for such payment in performance

of the judgment was and is summarily and administratively refused, which refusal was and is impugnment of its judicial finality and attack collaterally upon said judgment.

The present appeal is from the order entered below in dismissal of the appellant proceeding upon motion of the United States that the District Lex-fori limitations barred its prosecution and rendered it an insufficient claim for relief. As points of appeal, appellant brief only presented the inapplicability of the Lex-fori, or, else, that plea of same as affirmative defense was necessary.

Parenthetically, although the per curiam opinion excludes limitations from consideration, the Lex fori is plainly shown as not applicable. Assuming the District statute gave the judgment a life of 12 years from the time when it was first enforcible, such time would be statutorily and administratively run either from March 7, 1943, or from the time thereafter when the GAO settlement was effected. In either aspect, the 12 year life would extend to or beyond March 7, 1955, whereby the appellant proceeding was timely when instituted on December 4, 1954. (cf. Teller v. United States, 113 Fed. 463, (CCA-8), quoted on page 11 of Appellant Reply Brief).

As the District Lex-fori is not applicable, reversal on this single point, as determinative of appellant appeal, is proper.

Appellee, the United States, sought to widen the appeal by contentions, first, that neither sovereign consent nor precedent justified the appellant proceeding for judgment upon a prior judgment against the United States, and, second, that the federal six-year statute barred the appellant proceeding.

Parenthetically again, such first contention is not disposed of in the per curiam opinion and is fully rejected by the Court of Claims opinions in the precedents cited in said opinion as upholding another proposition advanced but then put aside by the per curiam opinion. The precedents were cited to uphold that Court of Claims jurisdiction of a

proceeding for judgment upon a prior judgment was based upon the fact that its judgments were made payable by subsequent specific appropriations, and not by previous general appropriation as in the case of the appellant judgment rendered in the District Court. However, specific appropriation as prerequisite to payment of a judgment of the Court of Claims does not appear. On the contrary, R.S. 1089, in effect until repealed in 1948, provided for payment of Court of Claims judgments, - "out of any general appropriation made by law for the payment and satisfaction of private claims . . ." Furthermore, the Benedict opinion recites that the Brown, O'Grady, Bonnafon and Norton cases were recoveries of claimant interests in accumulated proceeds, in the Treasury, of government sales of claimant property; also that the Weld case was claimant recoupment of previously advanced expenses of litigation. In such cases, appropriation was not necessary.

The second appellee contention, of the six-year statute, may well have been added as defense because appellant brief said appellant proceeding below was a new and independent action. This error and mistake, as a matter of law, appellant reply and supplemental brief corrected by establishing appellant proceeding was an ancillary continuance of the original action, essentially the revivor of the original judgment from dormancy, and was authorized, in substitution for the abolished writ of scire facias, generally by FRCP No. 81, and specifically by Local District Rule No. 30, discovered since issue of the per curiam, and pertinently as follows:

> A judgment may be revived against a judgment debtor on motion served with notice of hearing by the marshal or a person personally appointed to make service . . .

As appellant proceeding is not an independent action, the six-year statute does not apply.

The merit of appellant proceeding, despite all the appellee contentions, is submitted established by the foregoing.

There only remains the new aspect, put forward in the per curiam, in denial of all merit in appellant proceeding upon the single ground:

> "Petitioner seeks nothing more than a reaffirmation of his first judgment . . ."
>
> "It is a suit against the United States in which no issue not already litigated has been raised."

This new aspect is justified by Hetfield v. United States, as dismissed because there was no appropriation for payment of the judgment, and no new issue was raised. But, herein, is appropriation and summary refusal after entry of the judgment to give it due administrative performance.

This is a different case, wholly justified by the cited Benedict case. The opinion notes the action is upon a final judgment of another federal court, payable from available appropriation, partially so satisfied, and partially not so satisfied because of administrative refusal to pay that part of the adjudged recovery. The opinion also notes original doubt of the jurisdiction of the Court of Claims because the second judgment would allow claimant nothing beyond that allowed by the original judgment. The opinion upholds jurisdiction of the claim as founded upon the act of Congress that granted the appropriation. Illustrative of judicial interest in the finality of a judgment as conclusive against its revision except by the court that renders it or by appellate order, the opinion widens the jurisdiction of the Court of Claims to actions upon final judgments of other Federal courts, as requiring precise performance of them, although their relief is such as the Court of Claims could not give.

To say the Benedict claim, or appellant claim, cannot be asserted because the further relief would be no more than the original relief given to claimant, is to reason in a circle; such conclusion is not justified by the premises; the per curiam is unjust in rejecting appellant claim as not entitled to relief.

Relief for appellant being of interest, it is not necessarily manda-

mus as the per curiam intimates. The Court of Claims did not relegate Benedict to mandamus.

Courts may give pleadings effect to obtain and afford substantial justice. (Keiser v. Walsh, 73 U.S. App. D.C., 118 F. 2d 13; Peoples Gas Co. v. Federal Power Commission, 75 Idem. 235, 127 F. 2d 153; DeVito v. Hoffman, 91 Idem. 263, 199 F. 2d 468; Bartlett v. Bartlett, 94 Idem. 190; 221 F. 2d 508.)

In case of necessity, an appeal proceeding may become of mandatory effect, (Magnetic E.& M. v. Dings Mfg., 178 F. 2d 866; Steccone v. Morse Starrett P. Co., 191 F. 2d 197; Arrowhead Co. v. The Aimee Lykes, 193 F. 2d 83).

In United States v. Forbes, 51 App. D. C. 248, 278 Fed. 331, this Court, with extensive citation, holds, the only remedy of claimant on an insurance contract is exclusively the statutory action in which the appellant judgment was entered. Proper ancillary relief is therefore submitted to be exercised in the Court below in the pending anciliary proceeding of the appellant, instead of in independent original action against recalcitrant administrative officials.

Seeking and abiding by the discretion of the Court,

Respectfully submitted,

CAMDEN R. McATEE
1021 Tower Building
Washington, D.C.
Attorney for Appellant.

SERVICE AND CONSENT

Service of true copy of above Petition is acknowledged, and it is consented same may be filed and thereafter printed in final form as provided in the amended Rule of Court, this 11th day of February, 1957.

Attorney for Appellee.

CERTIFICATE OF GOOD FAITH

Pursuant to Rule, I hereby certify I have filed this Petition for Rehearing in good faith, as believing it has merit, and not for any purpose of delay.

Respectfully,

CAMDEN R. McATEE
Attorney for Appellant.

Court of Appeals caption omitted.

Before : Bazelon, Washington and Danaher,
Circuit Judges in Chambers.

ORDER.

Filed
Feb 25, 1957
Jos. D. Stewart
Clerk.

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing be, and it is hereby, denied.

Dated : February 25, 1957. Per Curiam.

Page 23 in SC Reco

-ooo-

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER.

Upon consideration of appellant's petition for rehearing, wherein appellant moves that the rehearing be in banc, it is

ORDERED by the Court that insofar as appellan moves for a rehearing in banc said petition be, and it is hereby, denied.

Filed
February 25, 1957
Jos. W. Stewart
Clerk.

Per Curiam

Circuit Judge Wilbur K. Miller did not participate in the foregoing order.

Dated: February 25, 1957.

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Caption of Court of Appeals here omitted.

DESIGNATION OF RECORD.

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of Certiorari, in the above entitled cause, and include the following:

1. The Appellant Appendix, annexed to Appellant's Brief, being the only Appendix.
2. Opinions.
3. Judgment.
4. Petition for rehearing.
5. Orders denying petition for rehearing.
6. This designation.
7. Clerk's certificate.

Service, certificate and Stipulation here omitted.

Filed May 9, 1957.
Joseph [illegible], Clerk.

-oOo-

Caption omitted.

Certification of Clerk to Record.

Dated May 17, 1957

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FILED
JUN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1122~~ 922

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of Joseph Kelly Kerr, deceased, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMDEN R. McATEE
Counsel for Petitioner
1021 Tower Bldg.,
Washington, D. C.

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No. 8(f) 3a
No. 81(6b) 3a

IN THE

Supreme Court of the United States

October Term, 1956

No.

THE CITIZENS BANK AND TRUST COMPANY
OF BLOOMINGTON, INDIANA,
Administrator d.b.n. of the Estate
of Joseph Kelly Kerr, deceased, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The above named petitioner respectfully prays this Honorable Court for issue of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, Circuit, (called hereinafter the Court of Appeals), entered on December 20, 1956, that affirmed, upon the sole ground that the complaint below fails to state a claim upon which relief can be granted, the previous judgment-order of

the United States District Court of the District of Columbia, (called hereinafter the District Court), that dismissed said complaint for failure to state a claim on which relief can be granted, on the different ground of limitations.

CITATION TO OPINION BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals, (*per curiam* and concurrence), (R. 7-11, and printed in Appendix B hereto), are presently reported officially in 85 Washington Law Reporter, (Advance Sheets), 527 and will later be reported officially in F.-2d, .

JURISDICTION

On December 20, 1956, the Court of Appeals entered its order in affirmance, (R. 12), of the judgment-order of the District Court, in dismissal of the complaint below, and, on February 25, 1957, (R. 22-23), denied the timely petition for rehearing of petitioner.

On May 12, 1957, within the statutory time for filing the present petition, which began to run from February 25, 1957, the Honorable Chief Justice received and granted *ex parte* application of petitioner for extension of said time, and by order of said date caused said time to be extended to and inclusive of June 25, 1957.

The jurisdiction herein is invoked under 28 USC, section 1254 (1).

THE QUESTION PRESENTED

Whether the complaint below, (R. 1-4), states a claim on which relief can be granted as responsive to its prayer to the District Court for general and special relief necessary to the statutory administrative and ministerial payment, due to petitioner on March 7,

1943, of the principal balance of $7404.75 of the final judgment of the District Court, in the prior action between the parties, for the recovery of $8227.50 from the United States by petitioner, which judgment balance is wrongfully withheld from and refused to petitioner, although duly appropriated by Congress and although neither petitioner nor its fiduciary estate, is or was ever indebted in any manner to the United States.

STATUTES AND RULES INVOLVED

The statutory provisions involved are contained in sections 16 and 19 of the War Risk Insurance Act, as amended, Act of June 7, 1924, ch. 320, Title I, 16 and 19, being 43 USC, 612 and 445; also act of June 25, 1948, C 646, 62 St. 974, being 28 USC, 2414; also Act of March 3, 1933, c. 212, Title 2, Sec. 13, 47 St. 1516, being 31 USC 227. The Federal Rules of Civil Procedure involved are, Nos. 1, 8f and 81(6b). Each item of the above is printed in Appendix A, infra, pp.

STATEMENT

On June 30, 1942, in the prior action between the parties, in which the United States consented to be sued and appropriated money to satisfy administratively the final judgment therein, and pursuant to mandate of this Court, the District Court entered its judgment against the United States for the recovery of $8227.50, forthwith payable, as one-tenth of same, ($822.75), as attorney fee to the attorney for petitioner, the plaintiff in said action, and, as the balance, ($7404.75), to petitioner. On March 7, 1943, when said litigation had finally terminated, pursuant to certification of the Attorney General, (28 USC, 2414 Supp. A), said judgment became final for statutory administrative ministerial payment and satisfaction, involving its transfer from the Department of Justice to

the Veterans Administrator, who thereupon affixed his voucher for its payment from the military and naval insurance appropriation subject to be so awarded by him, (38 USC 442, Supp. A), and so passed the judgment for preaudit, (31 USC 227, Supp. A), by the General Accounting Office, and payment by the Comptroller General. The preaudit involves ministerial acts of the Comptroller General if the records of the General Accounting Office disclose an existing indebtedness in any manner of the judgment-creditor to the United States. In such case, the Comptroller General withholds payment and seeks consent of the judgment creditor to satisfaction of such indebtedness from the judgment proceeds, or, if same is refused, withholds proceeds enough to satisfy the indebtedness and expense of promptly reducing same to final judgment in favor of the United States to be thereupon available as setoff against the original judgment. Any excess of the original judgment over the withholding is forthwith payable, and any subsequent excess of the withholding over the adjudged liability of the judgment-creditor for the indebtedness, is thereupon payable, with accrued interest, to the judgment creditor. The records in the prior action disclose the statutory administrative ministerial payment of $822.75, for account of said judgment and its provisions, but do not disclose the payment or other disposal of the appropriated judgment balance of $7404.75, wrongfully withheld from petitioner although neither petitioner nor its fiduciary estate is or was ever indebted in any manner to the United States.

On March 8, 1955, the District Court entered its order in dismissal of the complaint of petitioner, and on March 30, 1955, its further order in denial of rehearing to petitioner, whereupon petitioner appealed to the Court of Appeals on the grounds that the dismissal of the Complaint was material error, when

made upon motion instead of affirmative plea, and, made on the ground that the disclosure in the complaint of the lapse of more than 12 years, between June 30, 1942, the date of entry of the prior judgment, and December 4, 1954, the date of filing of the complaint of petitioner, barred the prosecution of the complaint, under the provision of the District Statute of Limitations, (D.C. Code, 16, 101-2), that a judgment of a District Court for the recovery of money shall be good and enforceable by an execution issued thereon, for the term of 12 years only from the date when an execution might first be issued thereon, which statutory construction disregards that 12 years had not elapsed from March 7, 1943, when the prior judgment was deemed final for the provided statutory administrative ministerial payment of same, and December 4, 1954, when the complaint below was filed by petitioner.

The *per curiam* opinion of the Court of Appeals briefly disposes of the appeal of petitioner, summarized therein as involving:

> . . . the dismissal of its suit against the United States . . . based upon a judgment entered in appellee's, (sic), favor . . . upon the original cause of action . . . on a policy of War Risk insurance. See *Citizens Loan Co.* v. *United States,* 316 U.S. 209, (1942).

After expressly putting aside:

> . . . various contentions . . . made before us chiefly concerning the statute of limitations . . . whether the statute making fund available for payment on insurance claims, 38 USC 442, evidences Congressional intention to allow the instant suit . . . .

the *per curiam* then further proceeds:

> We need not, however, decide whether an appropriation in advance of a judgment, constitutes consent to a later suit upon that judgment, for in any event, this suit was properly dismissed for failure to state a claim on which relief could be granted. Petitioner seeks nothing more than a reaffirmation of his first judgment. In this respect, the case is similar, to *Hetfield* v. *United States*, 78 Ct. Cls. 419, 422-23, (1933). There the action was dismissed because there had been no appropriation and because plaintiff put no question in issue other than that concluded by the prior judgment. In appropriate cases, of course, mandamus may lie against Government officials to compel performance of their duty to honor a judgment of the present sort. But this suit is not brought in mandamus. It is a suit against the United States in which no issue not already litigated has been raised. That being so, we affirm the judgment of the District Court, but solely on the ground we have stated. *Jones* v. *United States*, 97 U.S. App. D.C. 81, 228 F.2d 52, (1955), and do not reach the other points of the case.

The concurring opinion of Judge Danaher, the third member of the panel, states the Court did not reach the other questions because of complete agreement in the per curiam opinion, and comments whether petitioner might have proceeded differently below as possibly for mandatory relief.

The affirmance of the prior dismissal of the complaint and denials of petition for rehearing, are stated above.

Good reasons are believed to justify review of the *per curiam* decision herein that the original judgment

is *res adjudicata* and thus bars subsequent demand for wrongful withholding of the appropriated moneys provided for payment of the prior judgment.

REASONS FOR GRANTING THE WRIT

I. This Court has recognized its grant of the writ of certiorari is proper for examination into and resolution of the conflict of a decision of a Court of Appeals with a decision of the same issue by the Court of Claims of the United States, or by another Court of Appeals, and, of course, with a decision of this Supreme Court

Helvering v. *Intermountain Life Insurance Co.*, 291 U.S. 686, 689; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 392-95; and *United States* v. *Standard Rice Co.*, 323 U.S. 106, are decisions in which certiorari was granted to resolve conflict with decisions of the Court of Claims, and hence are good reasons for grant of the writ herein.

The denial of relief to petitioner by the exercise of jurisdiction in the determination of the Court of Appeals that the complaint does not state a ground for relief is dismissal of the case upon its merits and not for want of jurisdiction. (*Bell* v. *Hood*, 327 U.S. 678, 682).

Benedict v. *United States*, (1928), 66 Ct. Cls. 437, (Green, J., writing), a case substantially identical with the present case, grants judgment against the United States in the amount of the unpaid balance of a prior final judgment, for the recovery of money from the United States, entered in a District Court in the State of New York, being recovery of wrongful withholding of duly appropriated moneys necessary to pay and satisfy the original judgment by administrative ministerial payment of same to the judgment creditor. The judgments of the District Court below and of said District Court in New York are alike in that the judgment below for petitioner was entered

pursuant to a mandate of this Court, and the New York judgment was affirmed by the Court of Appeals and by this Court.

The *Benedict* opinion notes its judgment for the amount of the wrongful withholding allows no more than the original judgment allowed, and, because of jurisdictional limitations pertinent to the Court of Claims, might not allow as much as the New York District Court might allow in recovery of the wrongful withholding.

It is plain that the denial herein by the Court of Appeals of recovery of the withholding of $7404.75 of the original judgment conflicts with the decision of the Court of Claims in the *Benedict* case, in as much as petitioner would recover in the Court of Claims upon its claim to the wrongful withholding. The *Benedict* opinion emphasizes the conflict in its recital and explanation of its precedents granting judgment in recovery of wrongful withholding of appropriated moneys due to be paid in satisfaction of final judgments for money against the United States. In *United States* v. *O'Grady*, 22 Wall. (89 U.S.) 641 affirming 8 Ct. Cls. 451, and in *United States* v. *Weld*, 127 U.S. 51 affirming 23 Ct. Cls. 126, this Court has upheld the grant of judgment against the United States for recovery of wrongful withholding of appropriated moneys duly payable to satisfy a final judgment for the recovery of money from the United States.

It is plain such later judgment for recovery of wrongful withholding has reference to moneys previously appropriated to satisfy the prior judgment and hence, in the Court of Claims, is a judgment entered because there is a prior appropriation, meaning there is no distinction in the Court of Claims between appropriation prior to or subsequent to its judgment.

Lastly, it is plain that administrative ministerial payment of the later judgment for the withholding will quickly and completely pay and satisfy the original judgment to the extent it remained unsatisfied because of the wrongful withholding.

Grant of the writ, because of conflict of decision necessary to be resolved, is submitted proper.

II. The present case involves important questions about federal laws

The claim of petitioner herein against the United States is different from the claim in the original action in which the prior judgment was entered, (*Milwaukee County* v. *White Co.*, 296 U.S. 268, 275); and, as made in the District Court upon and related to its judgment in the original action, the claim of petitioner is ancillary to said original action, and is not an original action. The parties are deemed still in court for the purpose of giving effect to the judgment. (*Walden* v. *Craig*, 14 Pet. 147).

The claim of petitioner against the United States is based upon laws of the United States, as upon the prior judgment, and as for recovery of federal appropriated moneys wrongfully withheld from payment upon said judgment. (*Provident S. L. Assurance Soc.* v. *Ford*, 114 U.S. 635, 642; *Benedict* v. *United States*, *supra*).

Intimations in the *per curiam* and concurring opinions that a judgment creditor should proceed by mandamus against Government officials to compel performance of their duty to honor the judgment, instead of against the United States upon the judgment, are not in accord with the basic principle that he who brings suit is master to decide what law he will rely upon, and does determine by his complaint

whether he will bring suit as arising under the Constitution or the federal laws of the United States: (*The Fair* v. *Kohler Die & Specialty Co.*, 288 U.S. 22, 25):

In *Edgeport S. S. Co.* v. *United States*, 131 Ct. Cls. 210, 130 F. Supp. 333, the Court of Claims rejects contention of the United States that the pre-audit statute, (31 USC 227, Supp. A 2a), confines the claimant to the remedy of mandamus because a proceeding upon the judgment frustrates the purposes of the statute. The opinion after reciting the *Benedict* decision and other precedents Claimant recovery upon the judgment as the claimant procedure, proceeds:

> This section (31 USC 227) authorizes the Comptroller General to withhold from a final judgment any amount which he thinks the plaintiff may owe the defendant, but having done so the obligation is imposed upon him of instituting suit on the claim immediately, "if such debt is not already in suit". Congress did not mean for the Comptroller General to withhold payment of a judgment upon his own *ipse dixit*; . . . The objective was the judicial determination; it made no difference whether plaintiff or defendant initiated the action to secure the determination. . . . The initiative should not be taken from plaintiff; it has been awarded judgment. Congress has appropriated money to pay it; plaintiff should be permitted to enforce payment in any lawful manner it desires. We do not discern any intention on the part of Congress to prevent it from doing so.

III. The per curiam prevents simple and final disposal of the claim of petitioner to the wrongful withholding of the appropriated proceeds of the final judgment in the original action

The procedure, under 31 USC, 227, *supra*, for final settlement between the parties of all existing indebtedness of either to the other, if the parties are not in mutual agreement about settlement in performance of a final judgment for the recovery of money from the United States is simply the reduction of each claim of indebtedness to a final judgment for the recovery of money, with the judgments thereupon set off against each other.

Such composure of conflicting claims, if any, between the United States and petitioner does not appear herein. The forthwith ministerial administrative payment of the judgment balance of $7404.75, to petitioner, does not appear, and the indebtedness of petitioner, or of its fiduciary estate, to the United States, does not appear, which is necessary to proper withholding of forthwith payment of the judgment proceeds to petitioner. The concurring opinion considers the final judgment in the original action as "valid but dormant."

Petitioner complaint, in the same District Court, for relief, from the wrongful withholding of payment of the judgment balance of $7404.75 of the original judgment, by entry of a new judgment against the United States for petitioner recovery of $7404.75, rests upon the following settled precedent:

> We all know that when a judgment is recovered, it constitutes a new cause of action; on which there are three remedies, one, an execution, another, a writ of scire facias where execution is

delayed, *which results in a new judgment,* and third, an action of debt, which also results in a new judgment.— (Italics inserted for emphasis.)

Waddell v. *Cubell,* 21 D.C. 597, 600.

The writ of *scire facias quaere executio non* is defined to be a writ issued out of the court wherein a judgment has been entered, reciting said judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reasons, if any, why execution should not issue. Bingham, executions & Judgments, 123; Free. Executions, Sec. 81.—

Brown v. *Wygant,* 163 U.S. 618, 623.

Scire facias on a judgment is an ancillary proceeding, being merely a continuation of the suit in which the judgment was rendered. *United States* v. *Payne,* 147 U.S. 687, 690. (Other citations here omitted)

Green v. *Langnes,* 82 F. 2d 926, 927, (CCA-9).

The writs of scire facias and mandamus are abolished. Relief theretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

81(6b)—*Federal Rules of Civil Procedure.*

Petitioner complaint, as merely a continuation of the suit in which the judgment was rendered, is only for the relief previously afforded by a Writ of Scire Facias, viz: *a new judgment for forthwith recovery of the wrongful withholding* of the proceeds of its prior judgment for the recovery of money from the United States. The prior judgment will sustain the new judgment for $7404.75 as no existing indebtedness of petitioner will appear.

Shortly stated, the *per curiam* overlooks the ministerial administrative payment of money recoveries from the United States is made upon the original judgment, and continued upon the new judgment, which becomes the basis of renewal of payments wrongfully withheld, until full payment of the adjudged recovery is accomplished.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

(s) CAMDEN R. MCATEE
Camden R. McAtee
Attorney for Petitioner.

June 25, 1957

APPENDIX A

Statutes

Act of June 7, 1924, ch. 320, Title I, 16, as amended 43 St. 612. Appropriations for Mil. & Naval Ins: App.

38 USC 442: All sums appropriated prior to June 7, 1924, for the military and naval insurance appropriation and all premiums collected for the yearly renewable term insurance provided by the provisions of subchapter III of this chapter deposited and covered into the Treasury to the credit of this appropriation, shall, where unexpended, be made available for the Veteran's Administration. All premiums collected after June 7, 1924, for the yearly renewable term insurance provided by the provisions of said subchapter shall be deposited and covered into the Treasury for the credit of this appropriation. Such sum, including all premium payments, is made available for the payment of the liabilities of the United States incurred under contracts of yearly renewable term insurance made the provisions of said subchapter, including the refund of premiums and such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the United States District Court for the District of Columbia. Payments from this appropriation shall be made upon and in accordance with the awards by the Administrator of Veterans' Affairs.

Act of June 7, 1924, ch: 320, Title I, 19, as amended 43 St. 612. Actions on Claims; Jurisdiction; Procedure.

38 USC 445: In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them

resides, and jurisdiction is conferred upon such courts to hear and determines all such controversies. . . .

Act of June 25, 1948, c. 646, 62 St. 974. Payments of Judgments Against the United States.

28 USC-2414: Payment of final judgments rendered by a district court of the United States shall be made on settlements by the General Accounting Office. Whenever the Attorney General determines that no appeal shall be taken from a judgment against the United States or that no further review will be sought from a decision affirming same, he shall so certify and the judgment shall be deemed final.

Act of March 3, 1933, c. 212, Title II, Sec. 13, 47 St. 1516. Offsets Against Judgments Against United States.

31 USC 227: When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted

to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

Federal Rules of Civil Procedure. Under Authority of Act of June 19, 1934. USC 28, 2072. Formerly 723b, and Other Grants of Rule-Making Power.

No. 1—They (the Rules) shall be construed to secure the just, speedy and inexpensive determination of every action.

No. 8(f)—Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

No. 81(6b)—Scire facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate motion under the practice prescribed in these rules.

APPENDIX B

Opinions

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12822

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA,

Administrator d.b.n. of the Estate of Joseph Kelly Kerr, deceased, APPELLANT,

v.

THE UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the District of Columbia

Decided December 20, 1956

Mr. Camden R. McAtee for appellant.

Mr. Harold H. Greene, Assistant United States Attorney with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee. *Messrs. Leo A. Rover*, United States Attorney at the time record was filed, and *Carl W. Belcher*, Assistant United States Attorney, also entered appearances for appellee.

Before BAZELON, WASHINGTON and DANAHER, Circuit Judges.

PER CURIAM: Appellant complains of the dismissal of its suit against the United States filed December 4, 1954, and based upon a judgment entered in appellee's

favor as of June 30, 1942. The original cause of action arose on a policy of war risk insurance. See *United States v. Citizens Loan Co.*, 316 U.S. 209 (1942).

Various contentions have been made before us, chiefly concerning the statute of limitations of the District of Columbia, D. C. Code § 15-101 (1951), and the limitation contained in the World War Veterans' Act of 1924, 38 U. S. C. § 445 (1952). At the outset, however, doubt appears as to whether the Government has consented to be sued on the 1942 judgment. Appellant urges that the statute making funds available for payment on insurance claims, 38 U. S. C. § 442, evidences congressional intention to allow the instant suit. This statute is not, however, a specific appropriation to pay a judgment already entered but is rather a designation of a fund out of which such judgments as may thereafter be entered (on insurance claims) shall be paid. Thus, this case differs from those in the Court of Claims in which suits against the United States on prior judgments have been allowed, for in each case there had been a specific appropriation after the first judgment.[1] We need not, however, decide whether an appropriation in advance of a judgment constitutes consent to a later suit upon that judgment, for in any event this suit was properly dismissed for failure to state a claim on which relief could be granted. Petitioner seeks nothing more than a reaffirmation of his first judgment. In this respect the case is similar to *Hetfield v. United States*, 78 Ct. Cls. 419, 422-23 (1933). There the action was dismissed both because there had been no appropriation and because plain-

[1] See O'Grady v. United States, 8 Ct. Cls. 451, *affirmed*, 89 U.S. 641 (1874); Eastport Steamship Co. v. United States, 130 F. Supp. 333 (Ct. Cls. 1955); Stewart & Co. v. United States, 71 Ct. Cls. 126 (1930); Benedict v. United States, 66 Ct. Cls. 437 (1928); Helvetia Milk Condensing Co. v. United States, 3 F. Supp. 662 (Ct. Cls. 1933); Brown v. United States, 6 Ct. Cls. 171 (1870); Weld v. United States, 23 Ct. Cls. 126, *affirmed*, 127 U.S. 51 (1888).

tiff had put no question in issue other than that concluded by the prior judgment.[2] In appropriate cases, of course, mandamus may lie against Government officials to compel performance of their duty to honor a judgment of the present sort.[3] But this suit is not brought in mandamus. It is a suit against the United States in which no issue not already litigated has been raised. That being so, we affirm the judgment of the District Court, but solely on the ground we have stated, *Jones* v. *United States*, 97 U.S. App. D.C. 81, 228 F. 2d 52 (1955), and do not reach the other points in the case.

So ordered.

DANAHER, *Circuit Judge*, concurring: We are in complete agreement upon the foregoing opinion. Since we are disposing of the case on the ground mentioned above, we did not reach yet other questions. In what I now add, I speak only for myself.

The record had not disclosed to us why the Administrator and the Comptroller General failed to pay the appellant's judgment, entered in accordance with the Supreme Court's mandate, in 1942. The trial judge dismissed the action pursuant to the Government's reliance upon a District of Columbia statute, D. C. CODE § 15-101 (1951) which sets up a 12-year limitation. I would rather we were free to say that, in the circumstances the stat-

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[2] In each of the cases cited in note 1 there was a particular reason to justify the second suit (apart from the basic reason that the first judgment was unpaid). Thus, in *Eastport* and *Stewart* the administrative officer charged with payment was asserting a counterclaim, in *Brown, O'Grady* and *Weld* the officer had withheld from payment a deduction alleged to be improper, and in *Benedict* there was a dispute as to the amount of interest due on the initial judgment.

[3] Hines v. United States, 70 App. D.C. 206, 105 F.2d 85 (1939); Hammond v. Hull, 76 U.S. App. D.C. 301, 131 F.2d 23 (1942), *cert. denied*, 318 U.S. 777 (1943).

ute has no application,[1] and hence, had there been a claim against the proper parties seeking performance by them of "a purely ministerial duty,"[2] the statute would have been no bar. Could we thus say that the 1942 judgment is "final",[3] and even if treated as a "claim or demand,"[4] it had been timely filed, the way to a possible remedy would be indicated. That it was so filed in proper time is clear, indeed counsel fees amounting to 10 per cent of the judgment actually had been paid, yet the veteran's beneficiaries, or his estate, have been denied the benefits of the veteran's contract with his Government.[5]

So, considering that the judgment is valid but dormant, appellant would be free to seek its remedy[6] in a suit on that judgment, no longer open to defenses which might have been raised in the original action, but with relief possibly available in "the exercise of a sound judicial discretion and upon equitable principles . . . as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches."[7]

But as I say, we did not reach such questions.

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[1] Since by its very terms it treats of judgments to be enforced "by execution issued thereon," and the law makes no provision for issuance of execution against the Government. Cf. F.H.A. v. Burr, 309 U.S. 242, 250 (1940).

[2] Hines v. United States, 70 App. D.C. 206, 214, 105 F. 2d 85, 93 (D.C. Cir. 1939).

[3] Agreeably to the statute, 28 U.S.C. § 2414 (1952), since the Attorney General had certified that no appeal would be taken.

[4] 31 U.S.C. § 71a (1952).

[5] Cf. Lynch v. United States, 292 U.S. 571, 579 (1934).

[6] As in Hines v. United States, *supra* note 2; cf. Hammond v. Hull, 76 U.S. App. D.C. 301, 303, 131 F. 2d 23, 25 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 777 (1943).

[7] Arant v. Lane, 249 U.S. 367, 371 (1919); cf. Dollar v. Land, 87 U.S. App. D.C. 214, 226, 184 F. 2d 245, 257 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 884 (1950).

Judgment of Court of Appeals.

(R. 12)

[Caption here omitted.]

Appeal from the United States District Court for the District of Columbia.

Before Bazelon, Washington and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: December 20 1956.

Per Curiam.

Separate concurring opinion by Circuit Judge Danaher.

(copy)

Office - Supreme Court, U.S.
FILED
AUG 3 1957
JOHN T. FEY, Clerk

No. 222.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of JOSEPH KELLY KERR, Deceased,
Petitioner,

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER TO OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 222

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of JOSEPH KELLY KERR, Deceased,
Petitioner,

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER TO OPPOSITION

This Reply Brief is believed necessary because of unexpected conflict between the Petition and the Opposition as to the relief available to a judgment creditor

of the United States, whose final judgment for the recovery of money from the United States is outstanding and partially unpaid because of wrongful withholding of its proceeds, contrary to mandatory administrative procedure for ministerial payment and satisfaction of such judgment.[1]

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[1] The Opposition, (p. 6), states Congress has provided, in 28 U.S.C. 2414, specific procedure for the payment of judgments rendered in the district courts against the United States, and, in 31 U.S.C. 227, for judicial determination and setoff thereby of debts owed by its judgment creditor to the United States as against its judgment debt to the judgment creditor.

For 28 U.S.C. 2414 and 31 U.S.C. 227, see Petition-Appendix, A, pp. 2a-3a, and for their application see *Richmond, F. & P. R. Co. v. McCarl*, 63 F. 2d 293 (App. D.C.) and *Hines* v. *United States*, 105 F. 2d 85 (App. D.C.).

The basic administrative ministerial duty of obedient performance of the provisions of a duly allowed judgment for the recovery of money from the United States, is the ruling of this Court, in *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 647; quoted in *Hines* v. *United States*, *supra*, as follows:

> Judicial jurisdiction implies the power to hear and determine a cause and, inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the Government.

The allowed final judgment automatically effects its forthwith payment, unless there is established, or in the course of being established, an available setoff of contra indebtedness to the United States, or unless there is wrongful withholding of payment of some amount of the judgment. When the original judgment is judicially examined and the withholding is made recoverable by a new judgment therefor, final allowance of such new judgment effects automatic payment of the withholding. Thus, the new judgment in the District Court, as in the Court of Claims is automatically the end of the matter.

Material conflict is whether such relief, as claimed in the Petition, (pp. 2-3), is further judicial order in the same court for recovery of the unpaid balance, or, as claimed in the Opposition, (p. 2), is mandatory proceeding, for performance of 31 U.S.C. 227, (Pet. App. A, p 2a), by the recalcitrant officials.

The judgment for petitioner, now partially unpaid, was entered, pursuant to mandate of this Court, on June 30, 1942, in the District Court below, in prior litigation between the parties as to the liability of the United States to petitioner upon a war-risk insurance contract. It provided forthwith recovery from the United States of $8,227.50, payable as $822.75 to the attorney of petitioner as his fee, and as $7,404.75 to petitioner as the judgment balance. The judgment was allowed as final for its administrative payment on March 7, 1943, subject to its settlement by the General Accounting Office, as to the payments there upon to be made by the Comptroller General, pursuant to 31 U.S.C. 227, from the appropriated funds awarded by the Veterans Administrator as available for such payments. The duty of the Comptroller General was forthwith to pay the judgment, according to its provisions, if there was no indebtedness, in any manner, of the judgment creditor to the United States, or, otherwise, if there was such indebtedness and the parties did not agreeably settle their creditor-debtor relation, by necessary use of the proceeds of the judgment against the United States, he was to withhold sufficient of its judgment proceeds to protect the United States, and cause the institution and prosecution to final judgment of action by the United States against its judgment creditor for recovery of the indebtedness, thereupon to be set off against the creditor judgment, pro-

vided, if the final recovery of the indebtedness was less than the withholding, the Comptroller was to refund the excess with interest to the judgment creditor. The record, in the prior litigation, establishes forthwith payment administratively of the $822.75 attorney fee, but not of the $7,404.75 judgment balance to petitioner.

Alleging the foregoing matters, in a complaint for relief from the withholding, filed in the District Court below, on December 4, 1954, petitioner further alleged the wrongful withholding of the $7,404.75 judgment balance by the United States; and also that petitioner never was indebted in any manner to the United States. That the judgment balance is unpaid to petitioner is admitted by the Opposition, (p. 3).

The District Court below dismissed the complaint of petitioner as barred of remedy and from prosecution by the District *lex-fori* statute of limitations. Upon the appeal of petitioner from said dismissal, the appellate Court below, putting aside categorically all contentions, shortly affirmed the dismissal below, but upon the different and sole ground of *res adjudicata*, by holding the complaint presented no new issue and no more than an issue previously decided by the prior judgment.[2]

In support of its position that the way to payment of the outstanding judgment balance is a further and new judgment in and by the District Court against the United States for the outstanding judgment balance, the Petition presents the appellate dismissal below of the complaint, as direct and material conflict with de-

[2] See the appellate opinion in Petition-Appendix B, pp. 4a-7a, also quotation from the opinion in Petition pp. 5, 6.

cisions of this Court and of the Court of Claims, as involving important federal questions, and as denial of simple and expeditious relief.[3]

The Opposition meets the issues of the Petition only by posure of other issues,—whether the District Court lacked jurisdiction of the complaint that discloses it was filed more than six years and more than twelve years after the entry of the $8,227.50 judgment, also, whether the United States consented to be sued, and, also, whether sufficient claim for relief is stated in a complaint upon a judgment against the United States, that raises no question not already concluded by the prior judgment.[4]

The substance of the Opposition is that the way of relief, where there is administrative disregard of provided administrative procedure for the satisfaction of a money judgment against the United States, is mandatory proceeding against the recalcitrant officials. Such position is submitted too broadly taken in this proceeding wherein this Court confines its consideration to discussion of the matter relied upon as ground for its intervention by certiorari.[5]

The position taken in the Opposition conflicts materially with settled precedents. The appellate decision is here in issue and is therefore not a precedent for the Opposition position.

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[3] See Petition, Question, p. 2-3, Reasons, pp. 7-12.

[4] See Opposition, Questions, p. 2, Argument, pp. 3-7.

[5] *Alice State Bank* v. *Houston Products Co.*, 247 U.S. 240, 242.
Hubbard v. *Todd*, 171 U.S. 474, 494.
Southport Petr. Co. v. *National L. Rel. Bd.*, 315 U.S. 100, 102.

A cause of action upon a judgment is different from that upon which the judgment was entered.[6]

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, to which jurisdiction is to be exercised."[7]

Judicial recourse, consisting of a new judgment, is upheld in decisions of this Court and of the Court of Claims.[8]

The Court of Claims has explicitly rejected claim that 31 U.S.C. 227 bars other relief to the judgment creditor against wrongful withholding.[9]

Other contentions made in the Opposition, as to the right to be sued resulting from sovereign consent, and as to limitations, require comment.

There is admitted consent of the United States to be sued herein for claimant recovery of a judgment for the payment of money, thereupon allowable as a final

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[6] *Milwaukee County* v. *White Co.*, 206 U.S. 268, 265.

[7] *Wayman* v. *Southard*, 10 Wheat. 1, 23.

[8] *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 647.
Benedict v. *United States*, 66 Ct. Cls. 437.
Helvetia Milk Cond. Co. v. *United States*, 77 Ct. Cls. 743, Cert. denied, 290 U.S. 671.

[9] *Eastport S.S. Co.* v. *United States*, 131 Ct. Cls. 210, 130 F. Supp. 333, (quoted in Petition, p. 10.) Idem, 140 F. Supp. 773, 775; Ct. Cls.

Additional opinion: Plaintiff should not be compelled to resort to another forum to collect a judgment obtained in this court. It has the right to come here and show that the judgment was wrongfully withheld.

judgment requiring its ministerial administrative payment and satisfaction. Consequently, grant of a new claimant judgment, expressive of relief intended in but not effected by the original judgment, is but continuation of the original action, as no more that a bill of review answerable by the United States, or than a scire facias proceeding; and each is allowable by the initial consent to be sued and each is not subject to limitations.[10]

For cause shown in the Petition and herein, grant of the writ of certiorari as prayed by Petitioner is submitted to be a proper exercise of discretion.

Respectfully submitted,

CAMDEN R. MCATEE
Attorney for Petitioner.

August 30, 1957.

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[10] Note 7, *supra*.

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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1957.

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, ADMINISTRATOR d.b.n. OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
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In the Supreme Court of the United States

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No. 222

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, ADMINISTRATOR d.b.n. OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a-7a) is reported at 240 F. 2d 863.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1956 (Pet. App. 4a). A petition

for rehearing, timely filed, was denied on February 25, 1957, (R. 22).

The time within which to file a petition for a writ of certiorari was extended to and including June 25, 1957 by Chief Justice Warren on May 12, 1957. The petition for a writ of certiorari was filed on June 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction to entertain this suit on a judgment against the United States, where the complaint showed on its face that it was brought more than six years after the entry of the judgment.

2. Whether the United States has consented to be sued on this judgment.

3. Whether a suit on a judgment against the United States, which raises no question not already concluded by prior litigation, states a claim on which relief can be granted.

STATEMENT

Petitioner instituted this suit in the District Court for the District of Columbia on December 4, 1954, to obtain a judgment against the United States in the amount of $7,404.75 (R. 1). The basis for the suit was an outstanding unpaid judgment against the United States obtained in a prior suit on a policy of war risk insurance. (For the background of this litigation, see *United States* v. *Citizens Loan Co.*, 316 U.S. 209.) The complaint alleged that the prior

judgment, dated June 30, 1942, awarded $7,404.75 to the petitioner and $822.75 to Camden R. McAtee for legal services, and that the amount payable to the petitioner remained unpaid (R. 23). The record does not disclose why the judgment has not been paid.

On February 7, 1955, the United States moved to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 4). The motion was granted on March 8, 1955 (R. 6). A motion for rehearing (R. 6) was denied on March 30, 1955 (R. 6).

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the decision was affirmed *per curiam* (Pet. App. 4a-7a). The court ruled that the suit was properly dismissed for failure to state a claim on which relief could be granted, because the petitioner sought only a reaffirmation of his first judgment (Pet. App. 5a). A motion for rehearing was denied on February 25, 1957 (R. 22).

ARGUMENT

1. The District Court lacked jurisdiction to entertain the instant suit because the complaint showed on its face that it was barred by limitations. Suit was brought against the United States pursuant to 28 U.S.C. 1346(a).[1] 28 U.S.C. 2401 requires that suit be filed within six years from the time the right of action accrues. The judgment on which this suit is brought was entered on June 30, 1942 (R. 2). Except

[1] 28 U.S.C. 1346 is relied on in the complaint to establish district court jurisdiction (R. 2).

as to the allowance of attorney fees, which were paid, the complaint alleges that there has been a consistant and continuing refusal to pay the 1942 judgment. The instant complaint, however, was not filed until December 4, 1954, over twelve years after the entry of judgment. Thus, it is clear on the face of the complaint that suit was brought more than six years after the entry of the original judgment and is barred by the jurisdictional statute of limitations,[2] irrespective of whether the action be regarded as one on a judgment or a wrongful refusal to pay the judgment. The petition makes no reference to this obvious bar to suit.

2. A second jurisdictional objection to the maintenance of this suit is that the United States has not consented to be sued on the judgment.[3] It is elementary that the sovereign may not be sued without its consent, and 28 U.S.C. 1346 fails to include judgments among the classes of actions to which the United States has consented.

Petitioner appears to suggest (Pet. 9) that consent to suit on a judgment on a War Risk Insurance policy may be found in 38 U.S.C. 442,[5] which ap-

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[2] *Munro* v. *United States*, 303 U.S. 36; *Finn* v. *United States*, 123 U.S. 227.

[3] The Court of Appeals noted that "doubt appears as to whether the Government has consented to be sued on the 1942 judgment" (Pet. App. 5a).

[4] *Soriano* v. *United States*, 352 U.S. 270; *United States* v. *Sherwood*, 312 U.S. 584; *United States* v. *Shaw*, 309 U.S. 495.

[5] Act of June 7, 1924, 43 Stat. 612 (Pet. App. 1a).

propriates funds out of which such judgments may be paid. However, as the Court of Appeals correctly pointed out, that section is not a specific appropriation to pay a judgment already entered, but is the designation of a general fund for the payment of war risk insurance benefits and claims, including judgments (Pet. App. 5a). As such, it does no more than corroborate Congressional intention to grant jurisdiction over suits on war risk insurance policies, a jurisdiction which is specifically granted in 38 U.S.C. 445.[6] Because 38 U.S.C. 442 is a general appropriation made prior to the entry of judgment, it cannot be said to constitute a consent to a suit on a specific later judgment. This fact distinguishes the instant case from *Benedict* v. *United States*, 66 C. Cls. 437, which petitioner erroneously asserts conflicts with the instant decision, inasmuch as there a specific appropriation was made after the entry of judgment for the purpose of satisfying it.[7]

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[6] Act of June 7, 1924, 43 Stat. 612 (Pet. App. 1a). Petitioner neither alleges nor relies upon this section as conferring jurisdiction on district courts to entertain suits on judgments.

[7] In *Benedict*, the Court of Claims stated:

> * * * the court will take judicial notice that a specific appropriation was made by the act approved April 2, 1924 (Public No. 66, 68th Cong.), to pay the judgment upon which suit is brought, and certain other judgments, "together with such additional sums as may be necessary to pay interest thereon at the legal rate per annum as and where specified in said judgments."
>
> It thus appears that there was a special fund set aside by Congress for the payment of this judgment, together with interest according to its terms. * * * [66 C. Cls. 437, 443.]

3. Finally, the instant suit must be dismissed for failure to state a claim on which relief can be granted, since the complaint seeks nothing more than a reaffirmation of a prior judgment. The sound public policy behind dismissing a suit on a judgment against the United States which puts in issue no question not already concluded by prior litigation is obvious. The instant litigation would, if allowed, adjudicate nothing and would leave the plaintiff with a judgment that would be of no more value to it than the one which formed the basis for its suit. There is no more reason to suppose that a new judgment will be paid than that the original judgment will be paid.

Congress has provided a specific procedure for the payment of judgments rendered against the United States in the district courts. 28 U.S.C. 2414. An analogous procedure for the payment of judgments rendered in the Court of Claims is set out in 28 U.S.C. 2517. Specific provision is also made for setting off debts owed to the United States against such judgments, as well as for judicial determination of the propriety of such set-offs. 31 U.S.C. 227. If the proper official fails to pay the judgment when this procedure is followed, an action in the nature of mandamus will lie in appropriate cases to compel the official to honor the judgment. *Hines* v. *United States*, 105 F. 2d 85 (C.A.D.C.). In the face of this procedure for the payment and enforcement of judgments against the United States, it is clear that the normal procedures open to a plaintiff to realize the full benefit of a private judgment are not available against the

United States. A judgment on a judgment, normally available against a private party, loses all significance when sought against the Government, for in no way does it improve the plaintiff's position. As the Court of Appeals stated: "Petitioner seeks nothing more than a reaffirmation of his first judgment" (Pet. App. 5a).

In the only other suit we have found on a judgment against the United States which put in issue no question not already concluded by the prior judgment, the Court of Claims dismissed the petition. *Hetfield* v. *United States*, 78 C. Cls. 419.[8] One of the alternative grounds in that case for dismissing the petition was that no issue not already litigated had been raised. The suit was considered to be vexatious, "seeking nothing beneficial to the plaintiff and being merely an annoyance to the defendant" (*Id.* 422). In this same case, the Court of Claims distinguished its own decision in *Benedict* v. *United States*, *supra*, the distinction being the same as that made by the Court of Appeals in the instant case,[9] namely that in *Benedict* "there was a controversy as to the interest to be paid upon the judgment and for this reason payment had been delayed". *Hetfield* v. *United States*, *supra*, 421. Thus, an issue not previously litigated

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[8] See also *Daniel* v. *United States*, 78 C. Cls. 831, where the petition was dismissed without a statement of facts or opinion, on the authority of the *Hetfield* case, *supra*.

[9] In the instant case, the Court of Appeals noted that "in *Benedict* there was a dispute as to the amount of interest due on the initial judgment" (Pet. App. 6a).

was raised over which the court had jurisdiction.[10] The *Benedict* case, when viewed in the light of its subsequent interpretation by the Court of Claims, serves only to support the proposition that a complaint which seeks nothing more than a reaffirmation of a prior judgment must be dismissed.

Petitioner also relies on this Court's opinions in *United States* v. *O'Grady*, 22 Wall. 641, affirming 8 C. Cls. 451, and *United States* v. *Weld*, 127 U.S. 51, affirming 23 C. Cls. 126. But in both of those cases, the suit on the judgment raised for the first time the validity of a set-off. Thus, these cases merely sought a ruling adjudicating the propriety of the set-off.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
HERSHEL SHANKS,
Attorneys.

July 1957.

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[10] This difference also makes inapplicable to the instant case a series of Court of Claims cases which have permitted suit. *Eastport Steamship Co.* v. *United States*, 131 C. Cls. 210; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 713; *James Stewart & Co.* v. *United States*, 71 C. Cls. 126; *Brown* v. *United States*, 6 C. Cls. 171.

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No. 222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of JOSEPH KELLY KERR, Deceased,
Petitioner,

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR GRANT OF SAID WRIT.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR GRANT OF SAID WRIT.

Above petitioner, by its attorney, respectfully prays that this Court grant rehearing of its order of October 14th, 1957, (U.S.), and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, in the above entitled case, as prayed for in the petition filed June 25, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

As substantial grounds available to petitioner although not previously presented, petitioner respectfully shows as additional and material cause for grant of rehearing of the denial of certiorari and issue of writ of certiorari, as follows:

1. A Review by certiorari is sought of the judgment of the Court of Appeals in dismissal of the proceeding, instituted in the United States District Court for the District of Columbia, on the ground that it fails to state a claim upon which relief can be granted. The appellate *per curiam* opinion holds the sole ground for its judgment for dismissal is that the petitioner proceeding seeks only a reaffirmation of the prior judgment and raises nothing not previously litigated and adjudicated between the parties and not therein rendered *res adjudicata* by the previous judgment.[1]

2. Error in the above holding is submitted to be:

(A)—That the prior judgment is not *res adjudicata* of petitioner proceeding.[2]

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[1] The decisive *per curiam* appellate opinion is quoted in the Petition, page 6, and same, with the concurring opinion, appears in full in the Petition Appendix, pages 5a-7a.

[2] The citation, in the *per curiam* opinion, *Jones* v. *United States*, 228 F. 2d 52, 97 U.S. App. D.C. 81, does not support the appellate conclusion of *res adjudicata*. In the Federal courts in New York, the action of Jones et al., v. United States for tort damages caused by reliance in business transactions upon official information furnished to them but erroneous, because of deceit and negligence in its preparation, was finally dismissed for failure to state a claim upon which relief could be granted. The United States District Court in the District of Columbia thereafter granted summary judgment in dismissal of the action of Jones et al. v. United States for damages for negligence in furnishing said er-

(B)—Whether prosecuted as *scire facias* for a new judgment for the unpaid balance of the prior judgment, or as *substantive action* upon the prior judgment for a new judgment for the unpaid balance of the

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roneous information, and the Court of Appeals affirmed on the ground that this second action was barred as *res adjudicata* by the final dismissal of the first action upon the same subject matter in New York, citing *Stoll* v. *Gottlieb*, 305 U. S. 165, 172; therein, in a 77B proceeding in bankruptcy, the federal district court confirmed a proposed reorganization plan, over the objection of some creditors, and as binding upon all creditors, which allowed the substitution of certain corporate stock in substitution for certain bonds and in release of the personal individual guaranty endorsed upon the bonds; Gottlieb, an objecting creditor, after the confirmation order was entered, sued Stoll, as the guarantor upon several bonds, in the Chicago municipal court, and thereafter, in the bankruptcy proceeding, moved for vacation of the confirmation order, and did not appeal from the order that denied his motion. Stoll defended in the action against him that the order of confirmation and the order denying the Gottlieb motion were *res adjudicata* against the Gottlieb claim. The Municipal Court found for Gottlieb, the appellate court reversed, and the Supreme Court of Illinois again reversed, so that the Municipal Court judgment became final, subject to review by the Supreme Court of the United States. Therein, the judgment for Gottlieb was reversed as *res adjudicata* against him as not subject to collateral attack by Gottlieb, who had previously had his day in court and had not appealed the decisions against him.

Petitioner, in its proceeding in the district court, has in no way attacked the finality of the prior judgment, and, instead, has relied upon same as sustaining its claim for relief, consisting of entry of a new judgment against the United States in recovery of the unpaid judgment balance of the prior judgment due to petitioner as a debt of the United States.

Additionally, the right of petitioner in its proceeding below is sustained in *Cromwell* v. *Sac County*, 4 Otto (94 U.S.) 351, 354:

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or point controverted, upon the determination of which the finding or verdict was rendered.

prior judgment, the relief to petitioner is identical in such proceedings.[3]

[3] Under the prior judgment, petitioner has summary right to forthwith administrative payment of the portion of its excess, if any, over the portion withheld to protect the United States from loss of equivalent existing indebtedness of petitioner to the United States, forthwith to be prosecuted by the United States into final judgment in favor of the United States for set off against the petitioner-judgment, and, thereafter for any excess of the withholding, (and interest thereon), in excess of the judicially determined indebtedness of the petitioner to the United States, and with petitioner not obliged to defend the alleged indebtedness until judicially asserted (*Richmond F. & P. R. Co.* v. *McCarl*, 62 F. 2d 203, 207).

This protection to the United States, after judgment, against loss because of omission to assert a petitioner-indebtedness in the prior litigation, is the response of Congress, in the Act of March 3, 1875, now as amended, the Act of March 3, 1933, (c. 212, Title II, Sec. 13, 47 St. 1516; Petition Appendix, p. 2a), to the ruling of this Court, on February 15, 1875, in *United States* v. *O'Grady's Exrs.*, 22 Wall. 641, 648:

> . . . it is clear that when such a claim as that presented by the claimant in the original petition passes into judgment in a court of competent jurisdiction, it ceases to be open, under any existing act of Congress to revision by any of the executive departments or of all of such departments combined. Remedies such as have been suggested, if reasonable, may be pursued in a proper case, but it will be time enough to decide whether any remedy now remain when the question is properly presented.

Admittedly, a final judgment constitutes a new cause of action, on which the remedies are, first, execution, second, if execution be delayed, an ancillary *scire facias* proceeding, resulting in *a new judgment*, and, third, and action of debt upon the final judgment, also resulting in *a new judgment*. (*Waddell* v. *Cabell*, 21 D.C. 597, 600, Petition, p. 12).

As the United States is not subject to judicial execution it has instead provided its statutory procedure of payment of a final judgment for the recovery of money upon such judgment, and of further payment upon a new final judgment of payment due but not made upon the original final judgment. It follows such new

(C)—The instant decision conflicts with decisions, additional to those of this Court and of the Court of Claims relied upon by petitioner in its Petition.[4]

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a

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judgment may result from a proceeding by petitioner either by *scire facias* or by action of debt with reference to the original final judgment.

In *Miller* v. *United States*, 160 F. 2d 608, 609, it appears the United States, having a prior judgment as to which its petition for issue of execution was denied, thereafter sued upon the judgment and recovered a second judgment, against which it was defended that the denial of execution was *res adjudicata*, whereof, the opinion holds:

> We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action. Such a cause of action is a substantive right in the United States, not its procedural remedy.

In *United States* v. *Jenkins*, 141 F. Supp. 499, 505, affirmed, 238 F. 2d 83, 84, on the issue whether the United States could by a *scire facias* proceeding revive a dormant judgment, the holding is:

> The *scire facias* proceeding here is a proper civil proceeding to revive a final judgment validly imposed.

In *Raub* v. *Hurb*, 24 App. D.C. 211, 213, the ruling is that a judgment creditor, who is without right to another execution and is so driven either to action of debt upon the judgment, or to *scire facias* for its revival, is nevertheless not precluded from suing in equity for a timely decree in enforcement of the judgment, and such decree is the equivalent of an action at law upon the judgment and affords the debtor-defendant the same opportunity to defend as the action at law would afford.

[4] The foregoing decisions show conflict with the *res adjudicata* conclusion of the present decision in that the necessity for relief surmounts and puts aside technical objections involving the procedure to attain effective relief.

writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CAMDEN R. MCATEE
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to ground specified in Rule 58 of the rules of this Court.

CAMDEN R. MCATEE
Counsel for Petitioner.